In The
Supreme Court of the United States

October Term, 1978

No.

ERNST O. MOENCKMEIER and
JEANENE MOENCKMEIER,

Petitioners

v.

UNITED STATES OF AMERICA and
J. RICHARD HOOKS, Special Agent,
Internal Revenue Service

and

LANDMARK BANK OF ORLANDO,

Respondents.

APPENDIX TO
PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

JOHN JOSEPH MATONIS
225 Broadway, Suite 1800
San Diego, Calif. 92101
Phone: 213/967-7060

Counsel for Petitioners

February 5, 1979

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DECISIONS BELOW

(COPY)

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 78-1838

D. C. Docket No. CA78-74-Orl-Civ-R

UNITED STATES OF AMERICA and
J. RICHARD HOOKS, Special Ageny,
Internal Revenue Service,
Petitioners-Appellees,

versus

LANDMARK BANK OR ORLANDO,
Respondent,

ERNST O. MOENCKMEIER and
JEANENE MOENCKMEIER,
Intervenors-Appellants.

Appeal from the United States District Court for the Middle District of Florida

Before WISDOM, AINSWORTH and CLARK,
Circuit Judges.

J U D G M E N T

This cause came on to be heard on the transcript of the record from the United States District Court for the Middle District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered that appellants pay to appellees the costs on appeal to be taxed by the Clerk of this Court.

November 13, 1978

Issued As Mandate: Dec 14, 1978

(COPY)

UNITED STATES COURT OF APPEALS

FIFTH CIRCUIT

OFFICE OF THE CLERK

December 7, 1978

Edward W. Wadsworth
Clerk

Tel.504-589-6514
600 Camp Street
New Orleans, La.
70130

TO ALL PARTIES LISTED BELOW:

NO. 78-1838 - U.S.A. & J. RICHARD HOOKS v. LANDMARK BANK OF ORLANDO, ERNEST O. MOENCKMEIER & JEANENE MOENCKMEIER

Dear Counsel:

This is to advise that an order has this day been entered denying the petition( ) for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be pclled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the petition( ) for rehearing en banc has also been denied.

See Rules 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

EDWARD W. WADSWORTH, Clerk

By /s/ Sally Hayward
Deputy Clerk

cc: Mr. John Joseph Matonis
Messrs. Kendell W. Wherry
M. Carr Ferguson
Gilbert E. Andrews
Mr. F. Hartselle Baker
Ms. Ann Belanger Durney
Mr. George L. Hastings, Jr.

(COPY)

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

DO NOT PUBLISH

No. 78-1838

UNITED STATES OF AMERICA and
J. RICHARD HOOKS, Special Agent,
Internal Revenue Service,

Petitioners-Appellees,

versus

LANDMARK BANK OF ORLANDO,

Respondent,

ERNST O. MOENCKMEIER and
JEANENE MOENCKMEIER,

Intervenors-Appellants.

Appeal from the United States District Court
for the Middle District of Florida

(NOVEMBER 13, 1978)

Before WISDOM, AINSWORTH and CLARK, Circuit Judges.

PER CURIAM:

Affirmed on the basis of the Findings of Fact and Conclusions of Law of District Judge John A. Reed, Jr. dated March 22, 1978.

AFFIRMED.

(COPY)

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

UNITED STATES OF AMERICA
and J. RICHARD HOOKS,
Special Agent, Internal
Revenue Service,

Petitioners.

vs.

LANDMARK BANK OF ORLANDO,

Respondent.

ERNST O. MOENCKMEIER and
JEANENE MOENCKMEIER:

Intervenors.

No. 78-74-Orl-Civ-R

FILED
ORLANDO, FLA.
APR 5 1978
WESLEY R. THIES
CLERK

O R D E R

This cause came on for consideration without oral argument on the following motion filed by Intervenors and thereon, it is

ORDERED:

Motion to Vacate or to Alter and Amend Order etc.
Filing Date: 24 March 1978.

Disposition: Denied. Neither the Motion to Vacate nor the affidavits filed in support thereof present the court with any additional evidence that the telephones of the Intervenors are in anywise interfered with by an agency of the federal government. The affidavits, therefore, present no new evidence requiring reconsideration of the government's petition to enforce the Internal Revenue Service summons.

DONE AND ORDERED in Chambers at Orlando, Florida, this 5th day of April, 1978.

/s/ John A. Reed, Jr.
Judge

(COPY)

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

UNITED STATES OF AMERICA
and J. RICHARD HOOKS,
Special Agent, Internal
Revenue Service,

Petitioners,

vs.

LANDMARK BANK OF ORLANDO,

Respondent,

ERNST O. MOENCKMEIER and
JEANENE MOENCKMEIER,

Intervenors.

No. 78-74-Orl-Civ-R

FILED
ORLANDO, FLA.
MAR 22 1978
WESLEY R. THIES
CLERK

O R D E R

This cause having come on for hearing and all parties having adduced evidence and the questions presented having been fully argued to the court, the court makes the following findings and conclusions:

Findings of Fact

1. The court finds as a fact that the documents summoned from the Landmark Bank of Orlando are relevant to the investigation of the income tax liabilities of Ernst O. Moenckmeier and Jeanene Moenckmeier for the tax years 1974, 1975 and 1976.

2. The court further finds that the Moenckmeiers have made a substantial claim of unlawful electronic surveillance pursuant to Title 18, United States Code, Section 3504.

3. The court finds that the United States has made an adequate response in the form of affidavits submitted as Government Exhibits 1, 2 and 3, which affidavits specifically deny that any wiretaps were conducted by the Internal Revenue Service or by the Customs Service and this information was specifically supported by the testimony of J. Richard Hooks, Special Agent of the Internal Revenue Service, denying the use of any electronic surveillance. That Government Exhibits 1, 2 and 3 cover the relevant government agencies is shown by the testimony of the Intervenors as well as their Exhibits 4 and 5. The evidence reveals no agency of government except the Internal Revenue Service and the U.S. Customs Service to be investigating the Intervenors.

4. The court further finds that the government learned of the possible existence of the records at the Landmark Bank of Orlando through visual rather than electronic surveillance.

5. The court finds that the Internal Revenue Service does not have the documents for which the summonses were issued.

Conclusions of Law

1. The court concludes as a matter of law that the summonses issued to the Landmark Bank of Orlando were issued for a proper purpose and the required administrative steps were followed.

2. Jeanene Moenckmeier and Ernst O. Moenckmeier are entitled to intervene in these proceedings. 26 U.S.C.A. §7609.

3. The summonses in dispute are hereby ordered enforced with compliance to be completed within twenty days from the entry of this order, unless a notice of appeal is filed herein within that time, in which event this order will be stayed during the pendency of the appeal. During that time the Respondent shall preserve all records described in the summonses.

4. The court specifically reserves ruling on the allowance of costs to the Respondent Bank for the reproduction of the summoned records until after full compliance, at which time the Bank shall make application for the allowance of costs and the United States shall have ten days to respond thereto.

5. Precedent relied on by the court includes United States v. Greenleaf, CA 5, 1977, 546 F.2d 123, 126 and In re Millow, CA2, 1975, 529 F.2d 770.

DONE AND ORDERED in Chambers at Orlando, Florida, this 22nd day of March, 1978.

/s/ John A. Reed, Jr.
Judge

CONSTITUTIONAL AND STATUTORY
PROVISIONS INVOLVED

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States Amendment V.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any ciminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Title 18, United States Code, Section 2510(5)

"electronic, mechanical, or other device" means any device or apparatus which can be used to intercept a wire or oral communication other than--

(a) any telephone or telegraph instrument, equipment or facility, or any component thereof, (i) furnished to the subscriber or used by a communications common carrier in the ordinary course of its business and being used by the subscriber or user in the ordinary course of its business; or (ii) being used by a communications common carrier in the ordinary course of its business, or by an investigative or law enforcement officer in the ordinary course of his duties.

(b) a hearing aid or similar device being used to correct subnormal hearing to not better than normal;

Title 18, United States Code, Section 3504
Litigation concerning sources of evidence.

(a) In any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, or other authority of the United States--

(1) upon a claim by a party aggrieved that evidence is inadmissible because it is the primary product of an unlawful act or because it was obtained by the exploitation of an unlawful act, the opponent of the claim shall affirm or deny the occurrence of the alleged unlawful act;

(2) disclosure of information for a determination if evidence is inadmissible because it is the primary product of an unlawful act occurring prior to June 19, 1968, or because it was obtained by the exploitation of an unlawful act occurring prior to June 19, 1968, shall not be required unless such information may be relevant to a pending claim of such inadmissibility; and

(3) no claim shall be considered that evidence of an event is inadmissible on the ground that such evidence was obtained by the exploitation of an unlawful act occurring prior to June 19, 1968, if such event occurred more than five years after such allegedly unlawful act.

(b) As used in this section "unlawful act" means any act the use of any electronic, mechanical or other device (as defined in section 2510(5) of this title) in violation of the Constitution or laws of the United States or any regulations or standard promulgated pursuant thereto.

Title 26, United States Code, Section 7604
Enforcement of summons

(a) Jurisdiction of district court.--If any person is summoned under the internal revenue laws to appear, to testify, or to produce books, papers, records, or other data, the United States district court for the district in which such person resides or is found shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, records, or other data.

(b) Enforcement.--Whenever any person summoned under section 6420(e)(2), 6421(f)(2), 6424(d)(2),6427(f)(2) or 7602 neglects or refuses to obey such summons, or to produce books, papers, records, or other data, or to give testimony, as required, the Secretary may apply to the judge of the district court or to a United States commissioner for the district within which the person so summoned resides or is found for an attachment against him as for a contempt. It shall be the duty of the judge or commissioner to hear the application, and, if satisfactory proof is made, to issue an attachment, directed to some proper officer, for the arrest of such person, and upon his being brought before him to proceed to a hearing of the case; and upon such hearing the judge or the United States commissioner shall have power to make such order as he shall deem proper, not inconsistent with

the law for the punishment of contempts, to enforce obedience to the requirements of the summons and to punish such person for his default or disobedience.

(c) Cross references.--

(1) Authority to issue orders, processes, and judgments.--

(2) Penalties.--For penalties applicable to violation of section 6420(e)(2),6421(f)(2), 6424(d)(2), 6427(f)(2), or 7602, see section 7210.

Title 26, United States Code, Section 7609
Special procedures for third-party summonses

(a) Notice--

(1) In general.--If--

(A) any summons described in subsection (c) is served on any person who is a third-party recordkeeper, and

(B) the summons requires the production of any portion of records made or kept of the business transactions or affairs of any person (other than the person summoned) who is identified in the description of the records contained in the summons,

then notice of the summons shall be given to any person so identified within 3 days of the day on which such service is made, but no later than the 14th day before the day fixed in the summons as the day upon which such records are to be examined. Such notice shall be accompanied by a copy of the summons wich has been served and shall contain directions for staying compliance with the summons under subsection (b)(2).

(2) Sufficiency of notice.-- Such notice shall be sufficient if, on or before such third day, such notice is served in the manner provided in section 7603 (relating to service of summons) upon the person entitled to notice, or is

mailed by certified or registered mail to the last known address of such person, or, in the absence of a last known address, is left with the person summoned. If such notice is mailed, it shall be sufficient if mailed to the last known address of the person entitled to notice or, in the case of notice to the Secretary under section 6903 of the existence of a fiduciary relationship, to the last known address of the fiduciary of such person, even if such person or fiduciary is then deceased, under a legal disability, or no longer in existence.

(3) Third-party recordkeeper defined.-- For purposes of this subsection, the term "third-party recordkeeper" means--

(A) any mutual savings bank, cooperative bank, domestic building and loan association, or other savings institution chartered and supervised as a savings and loan or similar association under Federal or State law, any bank (as defined in section 581), or any credit union (within the meaning of section 501(c)(14)(A));

(B) any consumer reporting agency (as defined under section 603(d) of the Fair Credit Reporting Act (15 U.S.C. 1681a(f)));

(C) any person extending credit through the use of credit cards or similar devices;

(D) any broker (as defined in section 3(a)(4) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(4)));

(E) any attorney; and

(F) any accountant.

(4) Exceptions.--Paragraph (1) shall not apply to any summons--

(A) served on the person with respect to whose liability the summons is issued, or any officer or employee of such person,
(B) to determine whether or not records of the business transactions or affairs of an identified person have been made or kept, or
(C) described in subsection (f).

(5) Nature of summons. Any summons to which this subsection applies (and any summons in aid of collection described in subsection (c)(2)(B)) shall identify the taxpayer to whom the summons relates or the other information as will enable the person summoned to locate the records required under the summons.

(b) Right to intervene; right to stay compliance.--

(1) Intervention.--Notwithstanding any other law or rule of law, any person who is entitled to notice of a summons under subsection (a) shall have the right to intervene in any proceeding with respect to the enforcement of such summons under section 7604.

(2) Right to stay compliance.--Nothwithstanding any other law or rule of law, any person who is entitled to notice of a summons under subsection (a) shall have the right to stay compliance with the summons if, not later than the 14th day after the day such notice is given in the manner provided in subsection (a)(2)--
(A) notice in writing is given to the person summoned not to comply with the summons, and

(B) a copy of such notice not to comply with the summons is mailed by registered or certified mail to such person and to such office as the Secretary may direct in the notice referred to in subsection (a)(1).

(c) Summons to which section applies.--

(1) In general.-- Except as provided in paragraph (2), a summons is described in this subsection if it is issued under paragraph (2) of section 7602 or under section 6420(e)(2), 6421(f)(2), 6424(d)(2), or 6427(e)(2) and requires the production of records.

(2) Exceptions.-- A summons shall not be treated as described in this subsection if--
(A) it is solely to determine the identity of any person having a numbered account (or similar arrangement) with a bank or other institution described in subsection (a)(3)(A), or
(B) it is in aid of the collection of
(i) the liability of any person against whom an assessment has been made or judgment rendered, or
(ii) the liability at law or in equity of any transferee or fiduciary of any person referred to in clause (i).

(3) Records; certain related testimony.--For purposes of this section--

(A) the term "records" includes books, papers, or other data, and
(B) a summons requiring the giving of testimony relating to records shall

be treated as a summons requiring the production of such records.

(d) Restriction of examination of records. --No examination of any records required to be produced under a summons as to which notice is required under subsection (a) may be made--

(1) before the expiration of the 14-day period allowed for the notice not to comply under subsection (b)(2), or

(2) when the requirements of subsection (b)(2) have been met, except in accordance with an order issued by a court of competent jurisdiction authorizing examination of such records or with the consent of the person staying compliance.

(e) Suspension of statute of limitations.-- if any person takes any action as provided in subsection (b) and such person is the person with respect to whose liability the summons is issued (or is the agent, nominee, or other person acting under the direction or control of such person), then the running of any period of limitations under section 6501 (relating to the assessment and collection of tax) or under section 6531 (relating to criminal prosecutions) with respect to such person shall be suspended for the period during which a proceeding, and appeals therein, with respect to the enforcment of such summons is pending.

(f) Additional requirement in the case of a John Doe summons.--Any summons described in subsection (c) which does not identify the person with respect to whose liability the summons is issued may be served only after a court proceeding in which the Secretary establishes that--

(1) the summons relates to the investigation of a particular person or ascertainable group or class of persons,

(2) there is a reasonable basis for believing that such person or group or class of persons may fail or may have failed to comply with any provision of any internal revenue law, and

(3) the information sought to be obtained from the examination of the records (and the identity of the person or persons with respect to whose liability the summons is issued) is not readily available from other sources.

(g) Special exception for certain summonses. --In the case of any summons described in subsection (c), the provisions of subsection (a)(1) and (b) shall not apply if, upon petition by the Secretary, the court determines, on the basis of the facts and circumstances alleged, that there is reasonable cause to believe the giving of notice may lead to attempts to conceal, destroy, or alter records relevant to the examination, to prevent the communication of information from other persons through intimidation, bribery, or collusion, or to flee to avoid prosecution, testifying, or production of records.

(h) Jurisdiction of district court.--

(1) The United States district court for the district within which the person to be summoned resides or is found shall have jurisdiction to hear and determine proceedings brought under subsections (f) or (g). The determinations required to be made under subsections (f) and (g) shall be made ex parte and shall be made solely upon the petition

and supporting affidavits. An order denying the petition shall be deemed a final order which may be appealed.

(2) Except as to cases the court considers of greater importance, a proceeding brought for the enforcement of any summons, or a proceeding under this section, and appeals, take precedence on the docket over all cases and shall be assigned for hearing and decided at the earliest practicable date.

Added Pub.L. 94-455, Title XII, §1205(a), Oct. 4, 1976, 90 Stat. 1699.

(COPY)

RLF:jae

STATE OF NEW JERSEY :
SS: AFFIDAVIT
COUNTY OF ESSEX :

RICHARD L. FRIEDMAN, of full age, being duly dworn according to law upon his oath, deposes and says:

1. I am an Assistant United States Attorney for the District of New Jersey.

2. As part of my duties I investigated and handled civil and criminal litigation relating to activities of Ernest O. Moenckmeier, Jeanne Moenckmeier, Spectro Foods Corporation, etc. These matters, which relate to the manufacture and distribution of laetrile, were handled by the Food and Drug Administration (Newark, N.J.) under my supervision from on or about October 1976 to on or about March 1977. To the best of my knowledge during the above time and until today's date there has been no electronic surveillance or wire tapping in connection with these matters.

/s/ Richard L. Friedman
RICHARD L. FRIEDMAN
Assistant U.S. Attorney

Sworn and Subscribed
to before me this 16th
day of March, 1978

/s/ Alexandria Radel
A NOTARY PUBLIC OF NEW JERSEY
My Commission Expires 5/25/79

(COPY)

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

UNITED STATES OF AMERICA
AND J. RICHARD HOOKS PETITIONERS,
SPECIAL AGENT
INTERNAL REVENUE SERVICE

VS. No. 78-74-ORL-CIV-R

LANDMARK BANK OF ORLANDO

RESPONDENT.

AFFIDAVIT

I, NELSON H. PATNAUDE, of full age, being duly sworn according to law hereby depose and say:

1. I am a Special Agent employed by the Internal Revenue Service, Intelligence Division, Newark, New Jersey and have been so employed since 1961.

2. Since my involvement with the Intelligence Division investigation relating to JEANENE MOENCKMEIER and ERNST MOENCKMEIER I have no knowledge of any wire taps having been used in these investigations.

By: /s/ Nelson H. Patnaude
NELSON H. PATNAUDE
Special Agent
Intelligence Division
Newark, District Director's
Office
Internal Revenue Service

(Affidavit of Nelson H. Patnaude)

Sworn and subscribed to
before me on this 16th day
of March, 1978

/s/ Mildred M. Baker

NOTARY PUBLIC OF NEW JERSEY
My Commission Expires: 11/27/79

(COPY)

RECEIVED BY
U.S.ATTORNEY
MIDDLE DISTRICT
OF FLORIDA
MAR 20 1978
ORLANDO

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA

United States of America Plaintiff v. Ernst and Jeanene Moenckmeier Defendants	Affidavit

STATE OF NEW YORK
COUNTY OF NEW YORK ss.:

JOHN L. RENNISH being duly sworn deposes and says that:

1) I am a special agent in the United States Customs Service, Department of Treasury.

2) I am currently case agent assigned to investigate possible violations of Customs laws wherein Ernst and Jeanene Moenckmeier are the target of the investigation.

3) During the course of this investigation I have never used nor do I know of any other officer of the United States Customs Service using electronic eavesdropping techniques in obtaining evidence against Ernst and Jeanene Moenckmeier or any possible co-conspirator.

/s/ John L. Rennish
JOHN L. RENNISH

(Affidavit of John L. Rennish)

Sworn to before me this 17th
day of March, 1978

/s/ Harvey Barrison
HARVEY BARRISON
NOTARY PUBLIC, State of New York
No. 30-0173380
Qualified in Nassau County
Commission Expires March 30, 1979

CERTIFICATE OF SERVICE

I certify that on the 5th day of February, 1979, I served by U.S. mail first class postage prepaid, three copies of the foregoing appendix upon the Solicitor General, Department of Justice, Washington, D.C. 20530, three copies on Gilbert E. Andrews, Esq., Chief, Appellate Section, Tax Division, United States Department of Justice, Washington, D.C. 20530, counsel for respondent, and 3 copies of the foregoing appendix to F. Hartselle Baker, Esq., Hillcrest Plaza, Suite 202, 1516 East Hillcrest, Orlando, Florida 32803, counsel for respondent Landmark Bank of Orlando.

John Joseph Matonis